2005

State of Utah v. Thomas Westland Callahan : Brief of Appellee

Utah Court of Appeals

Elizabeth Hunt; Counsel for Appellant.
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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee	:	
v.	:	
THOMAS WESTLAND CALLAHAN	:	**Case No. 20050753-CA**
Defendant/Appellant	:	**Priority Two**

BRIEF OF APPELLEE

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An appeal from convictions of two class A misdemeanor counts of assault on a peace officer in violation of Utah Code Ann. §76-5-102.4 and one count of criminal trespass, a class C misdemeanor, in violation of Utah Code Ann. §76-6-206 following a jury trial on June 15, 2005 in the Third District Court, Salt Lake County, State of Utah, the Honorable Robin W. Reese presiding.

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

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JURISDICTION AND NATURE OF PROCEEDINGS

The defendant, Thomas Westland Callahan, appeals his convictions of two counts of assault on a peace officer, a class A misdemeanor, in violation of Utah Code Ann. §76-5-102.4 (supp. 2002) and one count of criminal trespass, a class C misdemeanor in violation of Utah Code Ann. §76-6-206 (supp. 2002).

This Court has Jurisdiction pursuant to Utah Code Ann. §78-2a-3(2)(e) (Supp. 2005) which grants the Utah Court of Appeals jurisdiction over appeals from criminal cases that do not involve first degree felonies or capital offenses.

ISSUES PRESENTED AND STANDARDS OF REVIEW

Issue No. 1: Did the prosecutor's summary of the testimony during closing argument constitute prosecutorial misconduct?

Standard of Review: In assessing whether a given statement constitutes prosecutorial misconduct, the appellate court views the statement in light of the totality of the evidence presented at trial. *State v. Longshaw*, 961 P.2d 925, 927 (Utah Ct. App.

1998); *State v. Cummins*, 939 P.2d 848, 852 (Utah Ct. App. 1992). The appellate court must first determine whether the remarks called the jury's attention to a matter that should not have been considered in reaching a verdict. The court must then determine "whether the error is substantial or prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result." *Longshaw*, 961 P.2d 925, 928.

Issue No. 2: Has the defendant shown that the evidence was insufficient to support the jury's verdict convicting him of criminal trespass?

Standard of Review: To prevail on appeal, the defendant must first marshal the evidence supporting the jury's verdict and then demonstrate that the jury's findings were clearly wrong—even when viewed in a light most favorable to the verdict. See, e.g., *State v. Scheel*, 823 P.2d 470, 472 (Utah Ct. App. 1991); *State v. Benvenuto*, 1999 UT 60, ¶ 13; *State v. Gamblin*, 2000 UT 44 n.2.

The appellate court reviews the evidence and draws all reasonable inferences in favor of the jury's verdict. *State v. Brown*, 948 P.2d 337, 343 (Utah 1997). A jury verdict will not be disturbed so long as there is some evidence, including reasonable inferences, establishing the requisite elements of the crime. *State v. Mead*, 2001 UT 58, ¶67. Reversal is only merited when the evidence is sufficiently inconclusive or inherently improbable that reasonable minds must have exercised a reasonable doubt that the convicted person committed the crime. *Mead*, 2001 UT 58, at ¶65; *State v. Workman*, 852 P.2d 981 at 985-86 (Utah 1993).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The text of all constitutional provisions, statutes, and rules pertinent to the resolution of the issues before this Court is contained in the body of this brief.

STATEMENT OF THE CASE

On September 25, 2002 the defendant, Thomas Westland Callahan, was charged by Information with one count of criminal trespass, a class C misdemeanor in violation of Utah Code Ann. §76-6-206 (supp. 2002) and three class A misdemeanor counts of assaulting a peace officer in violation of §76-5-102.4 (supp. 2002) R.1-3. A jury trial was held on June 16, 2005 and the defendant was convicted of two counts of assaulting a police officer and criminal trespass. R.70-71. The defendant was sentenced on August 1, 2005 to concurrent terms of 365 days jail with credit for time served, placed on twelve months court probation, and ordered not to return to the Liberty Senior Center. R.105. The defendant filed notice of appeal on August 31, 2005. R.110-11.

PROCEDURAL BACKGROUND

An Information charging the defendant with three counts of assaulting a peace officer and one count of criminal trespass was filed in Third District Court on September 25, 2002. R.1-3. At that time, the defendant had been released and a warrant was issued for his arrest. R.10-11.

The defendant remained at large until May 25, 2004 when he was booked on the warrant. R.12. The defendant was arraigned before the Honorable Judge Reese in Third District Court on May 28, 2004 and Salt Lake Legal Defenders Association

("LDA") was appointed to represent him. R.19. Cathy Lilly of LDA filed an appearance of counsel, request for discovery and demand for jury trial on June 4, 2004. R.21-24. A pretrial conference was held on July 21, 2004 where a jury trial was scheduled for August 26, 2004. R. 29-30. On August 25, 2004 Ms. Lilly filed a motion to continue the jury trial to enquire into the defendant's mental health. R.31-34. The State stipulated to the defendant's motion and the jury trial was continued to October 20, 2004. R.35-36.

On October 20, 2004 Ms. Lilly filed a petition requesting a formal inquiry into the defendant's competency, alleging that the defendant was delusional and suffered from limited mental functioning. R.39-40. Judge Reese ordered Dr. Nancy Cohn and Dr. Mark Rindflesh to conduct comprehensive examinations of the defendant to determine if he was legally competent to proceed at trial. R.42-44. The trial was continued indefinitely until the mental health evaluations could be completed and the court set a review hearing for December 14, 2004. R.37-38.

The defendant refused to be transported from the jail to the courthouse on December 14, 2004 and the review was continued to January 24, 2005. R.48. The defendant was not transported again on January 24, 2005 and the hearing was continued to February 25, 2005. R.50. When the defendant refused to be transported a third time, Judge Reese issued an order demanding that the defendant be transported to the courthouse and continued the hearing to March 21 2005. R.53.

By March 8, 2005 the mental health evaluations were completed and the State submitted the stipulated Findings of Fact to the court. R.54-56. Dr. Rindflesh noted that the defendant was uncooperative and antisocial, but concluded that he was competent to proceed. R.55. Similarly, Dr. Cohn found the defendant to be irritable but competent.

R.55. On March 10, 2005 Judge Reese signed the order finding the defendant competent to proceed. R.57.

The jury trial was initially scheduled for April 20, 2005. The defendant was transported to the courthouse but he attacked a bailiff and was sent back to the jail before the trial could commence. Judge Reese denied the State's motion to try the defendant in absentia and the witnesses and jurors were excused. Judge Reese set a pretrial date for May 17, 2005 to give the defendant one last chance to participate in the proceedings against him. R 62-63.

On May 17, 2005 the defendant was present in court for the first time since the first pretrial conference on July 21, 2004. Judge Reese advised the defendant that the jury trial would go forward on June 15, 2005 whether the defendant chose to participate or not. The judge urged the defendant to cooperate in his defense so he could receive a fair trail. R. 68-69.

The jury trial was finally held on June 15, 2005. R.124. Nancy Freeman and Officer Russell Peterson testified for the State. The defendant was present but chose not to testify and did not call any witnesses. The jury convicted the defendant of two class A misdemeanor counts of assaulting a peace officer and one class C misdemeanor count of criminal trespass.

STATEMENT OF FACTS

On August 26, 2002, the defendant was trespassing at the Liberty Senior Center. When officers arrived to investigate, the defendant assaulted them. The following facts are derived from witness testimony and are recited in the light most favorable to the jury's verdict. *See State v. Gordon*, 913 P.2d 350, 351 (Utah 1996).

The Liberty Senior Center is a neighborhood day center in Salt Lake City, Utah. It is open during the week from 8:00 am to 3:30 pm and provides meals, activities and educational programs to people sixty years of age and older. R.124:13, 20. In the winter of 2002 the defendant began frequenting the Liberty Center. R.124:19-20. At sixty years of age, he was one of the youngest patrons. The defendant was homeless at the time and the Liberty Center staff had received complaints that he was sleeping on the Liberty Center Grounds after business hours. R.124:24, 25, 31, 35, 44. The staff fed him and attempted to help him find housing, but their efforts were thwarted by the defendant's volatile personality and hostile outbursts. R.124: 21-23, 27, 38, 39, 44. Indeed, one staff member felt so threatened by the defendant that he asked for a restraining order in an incident report. R.124:30.

On at least two occasions, the defendant was asked to leave the Center after violently confronting staff members. R.124:21-22, 23-24, 27. The first incident occurred in the lunchroom on June 27, 2002 when the defendant began yelling obscenities, throwing things and threatening staff. R.124:21-22, 38. Staff Director Nancy Freeman asked the defendant to step outside and calm down. As she walked outside with him, the defendant continued yelling obscenities in her face. When she tried to find out what was bothering the defendant, he became enraged and threw something before leaving. R.124:22, 38. When the defendant returned the next morning, Ms. Freeman informed him that such behavior could not be tolerated and that she would call the police if he acted violently again or threatened staff or patrons. R.124:22, 38-39.

The second incident occurred on August 23, 2002. When the defendant was not immediately served lunch he threw his lunch tray and began yelling at staff members. R.124:23-24, 39-40. Ms. Freeman heard the tumult from her office and went to the lunchroom where she was confronted by the defensive and angry defendant. R.124:39. Ms. Freeman told the defendant he was immediately banned from the Center for his violent and abusive behavior. R.124:32, 44. She further advised him that he was not to be on the premises after hours and that police would be called if he returned to the Center at any time. R.124:31-32, 44. Ms. Freeman drafted a letter on August 28, 2002, documenting the defendant's abusive behavior and formalizing the reasons for his suspension from the facility. R. 124:27, 29, 40.

On August 26, 2002 Officers Russell Peterson and Jared Wihongi investigated such a complaint that the defendant was trespassing on the Liberty Center property after business hours. R.124:49. On arrival, the officers found the defendant seated at a picnic table on the patio outside the closed Liberty Center. R.124:50-51. The officers noted that the defendant matched the description of the suspected trespasser given by dispatch. R.124:50-51.

The officers identified themselves and attempted to investigate the trespass complaint. R.124:52-53. The defendant appeared to be opening a can of food with a multipurpose pocketknife known as a "Leatherman" tool--- a device that typically includes knives, pliers, and a can-opener attachment. R. 124:52. For safety reasons, Officer Peterson asked the defendant to put the tool on the table while they talked. The defendant refused and Officer Peterson removed the tool and placed it on the other end of the table. R.124:52, 62.

Officer Peterson began to explain that there had been a criminal trespass complaint and asked the defendant why he was on the premises. The defendant shouted that he was just trying to eat his food. Officer Peterson noted that the defendant became increasingly hostile and agitated while speaking with the officers. R.124:52, 62.

Officer Peterson returned to his patrol car to call dispatch and gather more information while Officer Wihongi waited with the defendant. When Officer Peterson turned away, the defendant grabbed the Leatherman tool from across the table and threatened Officer Wihongi with it. R.124:67-68. When Officer Wihongi asked him to put the tool down, the defendant began shouting that Officer Wihongi would have to shoot him before he would relinquish the tool. R.124:71. Officer Wihongi snatched the tool away and the defendant took a "fighting stance" with his fists raised. R.124:54, 55, 71.

Officer Peterson saw what was happening and dropped the phone, rushing back to help Officer Wihongi. Both officers struggled to control the defendant and when the officers raised their batons, the defendant appeared to calm down. The respite was short lived and the defendant resumed his confrontational posture. The defendant continued to fight and struggle with both officers until they were able to place him in handcuffs. R.124:54.

Again, the officers believed the situation had been defused and again, the defendant resumed his assault. When the officers attempted to escort the defendant to the patrol car, the defendant forcefully turned himself toward Officer Peterson, knocking both men to the ground. R.124:54, 58, 64. The officers struggled to gain control while the defendant spat at Officer Peterson's face, attempted to kick both officers, and "tried

to bite Officer Wihongi in the leg." R.124:56, 57. Officer Peterson's right ankle was injured during the fracas and he later went to LDS Hospital for an evaluation. R.124:60.

By this time a third officer, Sergeant Findlay, had arrived. It ultimately took the combined efforts of all three officers to subdue the defendant and place him in the patrol car. R.124:67. The defendant continued to thrash about and kick at the officers until they were able to secure his ankles with shackles and transport him to jail. The defendant calmed down during the ride but became agitated again upon arriving at jail and instigated another fight with corrections officers. R.124:60.

SUMMARY OF THE ARGUMENT

The defendant raises two issues on appeal.[1] First, he claims that the prosecutor's characterization of the testimony during closing argument constitutes prosecutorial misconduct. Second, he contends that the evidence is insufficient to support the jury's verdict finding him guilty of criminal trespass.

The prosecutor's summary of evidence during closing arguments did not constitute prosecutorial misconduct. The prosecutor merely summarized the testimony presented at trial and drew reasonable inferences as reflected by the record. In any

[1]The defendant also alleges that the district court committed plain error by submitting the criminal trespass charge to the jury. Alternatively he claims that defense counsel was ineffective by failing to make a motion for directed verdict. *See*, Aplt. Brief at 11-13. These arguments are not sufficiently briefed to warrant thorough scrutiny. Under the plain error standard, a conviction will be reversed for insufficient evidence only if the appellate court determines "that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury." *State v. Diaz*, 2002 UT App 288, ¶32; (quoting *State v. Holgate* 2000 UT 74, ¶17). Such is not the case here. "Given the sufficiency of the evidence supporting the [criminal trespass] charge . . . the district court did not commit plain error and counsel was not ineffective in failing to make a motion for directed verdict." *State v. Dillon*, 2005 UT App 533 (*per curiam*).

event, the trial judge cured any potential prejudice to the defendant by repeatedly instructing the jury that closing arguments are not evidence.

With respect to the sufficiency claim, the defendant's arguments should not be considered by this Court because the issue was not preserved at trial. Moreover, the defendant has failed to marshal the evidence in support of the jury's verdict and demonstrate its insufficiency. On appeal, the defendant merely paraphrases his closing argument, framing the facts in a light more favorable to himself. This does not satisfy the marshaling requirement or rebut the presumption that the jury verdict was correct. Drawing all reasonable inferences in favor of the jury verdict, there was ample evidence to support the criminal trespass conviction.

ARGUMENT

I. THE PROSECUTOR'S SUMMARY OF THE EVIDENCE DURING CLOSING ARGUMENT WAS SUPPORTED BY THE RECORD AND DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

Assessing prosecutorial misconduct during closing argument requires a two-step analysis. First, the appellate court must determine whether the prosecutor's remarks called the jury's attention to a matter that should not have been considered in reaching a verdict. *State v. Bakalov*, 1999 UT 45, ¶61. The court must then determine whether the statement was harmful, i.e. "whether the error is substantial or prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result." *Longshaw*, 961 P.2d 925, 928 (citations and quotations omitted).

The defendant claims that "[t]he prosecutor's discussion of facts not in evidence in closing argument requires a new trial." Aplt. Brief at 8. Contrary to defendant's assertion, the prosecutor's comments were firmly based on uncontroverted testimony

as demonstrated by the record on appeal. The statements are therefore permissible in light of the evidence and there is no need to apply the second prong of the *Longshaw* analysis. However, even if the statements had exceeded the scope of the officer's testimony, any potential prejudice to defendant was cured by the trial judge's repeated instructions to the jury that closing arguments are not evidence.

a. The Prosecutor's statements were supported by the record

This Court should deny the defendant's claim because the prosecutor merely summarized the testimony presented at trial. An attorney is accorded "broad latitude" in arguing his or her theory of the case to the trier of fact. *State v. Dunn*, 850 P.2d 1201, 1224 (Utah 1993) cited in *Bakalov*, 1999 UT 45, ¶61. In advancing an argument, "the prosecutor may fully discuss . . . reasonable inferences and deductions drawn from the evidence[.]" *Id.* at ¶59. Accordingly, in determining whether a statement made during closing argument constitutes prosecutorial misconduct, the statement must be viewed in light of the totality of the evidence presented at trial. *Longhsaw*, 961 P.2d 925, 927.

The defendant objects to this characterization of the testimony, asserting that "there was no evidence that [the defendant] pointed the Leatherman at the officers and threatened [Officer] Wihongi with it." Aplt. Brief at 8. The defendant further asserts that "there is no evidence that an officer approached [the defendant] and asked to speak to him, and [the defendant] spit at him, kicked him and waived a can opener in his face." D. Brief at 8-9. The defendant's assertions are patently untenable in light of the testimony at trial.

Officer Peterson testified that the officers identified themselves and attempted to investigate the trespass complaint. R.124:52-53. When Officer Peterson returned to his patrol car to gather more information, the defendant threatened Officer Wihongi with the can opener attachment on the Leatherman tool. R.124:67-68, 71. When Officer Wihongi snatched the tool away, the defendant took a "fighting stance" with his fists raised. R.124:55, 71.

Officer Peterson testified that when he attempted to escort the defendant to his patrol car, the defendant forcefully knocked him to the ground. R.124:64. The defendant then spat at Officer Peterson but "he didn't hit me in the face [although] I believe that was his intention." R.124:56-57. Officer Peterson further testified that the defendant was "swinging his legs violently" and attempted to kick both officers and "tried to bite [Officer Wihongi] in the leg." R.124:57, 60. While Officer Peterson didn't specifically recall being kicked, he did receive medical treatment for an injury to his ankle following his encounter with the defendant. R.124:57.

Based on the uncontroverted testimony of Officer Peterson, it is evident that the prosecutor did not misstate the evidence as the defendant insists. Nor did he "sway the jury to consider factors other than evidence presented at trial." *Bakalov*, 1999 UT 45, ¶58. The prosecutor accurately summarized Officer Peterson's testimony and his statements were supported by the record. Similarly, the inference that the defendant waived a can opener in Officer Wihongi's face was reasonable in light of the testimony that the defendant grabbed the Leatherman tool and threatened Officer Wihongi with it. The prosecutor merely recapitulated the testimony offered at trial and drew reasonable inferences from the evidence. The prosecutor "did not attempt to emotionally rouse the

jurors but asked them, as reasonable people, to consider the situation [the officers] faced." *State v. Williams*, 656 P.2d 450, 453-54 (Utah 1992). The prosecutor's statements were permissible in light of the evidence, therefore, the statements did not constitute prosecutorial misconduct and the defendant's argument fails. *Longhsaw*, 961 P.2d at 927.

b. The trial judge cured any error by instructing the jury that closing arguments are not evidence.

Utah courts have long recognized that opening statements and closing arguments are not evidence. *See, e.g. State v. Hall*, 186 P.2d 970, 972 (Utah 1947). Although attorneys are granted broad discretion in making closing arguments, trial judges routinely instruct jurors to rely on their own recollection of the testimony and weigh the evidence accordingly. Such was the case here. On two occasions, defense counsel objected to the prosecutor's characterization of the evidence during closing argument. On both occasions Judge Reese *sua sponte* instructed the jurors that remarks made during closing arguments are not evidence, thus curing any defect. *See, Longshaw,* 961 P.2d at 929-30.

When defense counsel first objected to the prosecutor's characterization of Officer Peterson's testimony, Judge Reese reminded the jury that attorneys are "advocates, not witnesses. What they say is not evidence." R.124:97. The Judge further instructed the jury to "[r]ely on your own recollection of what the witnesses said, *not necessarily on what you hear the attorneys say* when they summarize it." Id (emphasis added).

A few minutes later, the defendant renewed his objection when the prosecutor rhetorically asked the jury whether it was appropriate to kick and spit at police officers. Judge Reese issued a second curative instruction, advising the jury to "recall the testimony from [Officer Peterson] about what happened, and what he saw, and what [Officer Wihongi] told him. *You can accept or disregard what the attorney said*[.]" Id. R.124:108 (emphasis added).

Furthermore, the jurors were provided with a written instruction emphasizing that statements of lawyers are not evidence. In pertinent part, Instruction 10 advised the jurors that:

> If during the trial or their closing statements the lawyers have made statements concerning the evidence that does not conform to your recollection or memory of it, *you should disregard the lawyer's statements* and rely on your own recollection of the evidence.
>
> If either lawyer's arguments included statements of the law which differ from the law that I've given you, *you should disregard the statements* and rely entirely on the law as given to you by me.
>
> R. 86, 124:83 (emphasis added).

The judge specifically instructed the jurors *not* to rely on the statements of the attorneys. Thus, the defendant's claim that the trail court failed to "reign in" [*sic*] the prosecutor and "instructed the jurors to rely on what the prosecutor said [ ]" is simply false. *See* Aplt. Brief at 9.

Finally, it must be noted that the defendant also argued his theory of the case and offered his own version of the facts to the jury during his opening statement and closing argument. He therefore had the opportunity to rebut the prosecutor's interpretation of the facts and ameliorate the damage of any statements made by the

prosecutor. *See, e.g. State v. Dunn*, 850 P.2d at 1225. Accordingly, the defendant's claim that the jury improperly relied on the "misstatements" of the prosecutor in reaching their verdict is without merit.

II THE DEFENDANT HAS FAILED TO MARSHAL THE EVIDENCE, MOREOVER, THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION FOR CRIMINAL TRESSPASS

As an initial matter, the defendant's arguments regarding the sufficiency of the evidence should not be considered by this Court because the issue was not preserved at trial. *See State v. Labrum*, 952 P.2d 937 (Utah 1996); *State v. Dean*, 2004 Utah 63. Even if the issue had been preserved at trial, the defendant's appeal must fail because he has not marshaled the evidence supporting the jury verdict, nor has he shown that the evidence was insufficient to support the conviction. *See, e.g.,Scheel*, 823 P.2d 470, 472; *State v. Moore*, 802 P.2d 732, 738 (Utah Ct. App. 1990). On appeal, the "defendant has simply quoted those items from the record that arguably support his position." *State v. Gamblin*, 2000 UT 44, ¶17. Thus, even if defendant's failure to marshal were not fatal to his sufficiency claim, the defendant has failed to demonstrate that the evidence supporting the conviction of criminal trespass is insufficient. *State v. Mead*, 2001 UT 58, ¶67.

a. Failure to Marshal

In challenging the sufficiency of the evidence, "the burden on defendant is heavy." *State v. Lemons*, 844 P.2d 378, 381 (Utah App. 1992), *cert. denied*, 857 P.2d 948 (Utah 1993). The defendant must first "marshal all evidence *supporting* the jury's verdict and must then show how this marshaled evidence is insufficient to support the verdict even when viewed in the light most favorable to the verdict." *Scheel*, 823 P.2d

470, 472 (quotations omitted). As this Court has previously explained:

> "In order to properly discharge the [marshaling] duty . . . the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced which *supports* the very [evidence] the appellant resists." Once appellants have established every pillar supporting their adversary's position, they then "must ferret out a fatal flaw in the evidence" and show why those pillars fail to support the [evidence].

Oneida/SLIC v. Oneida Cold Storage and Warehouse, Inc., 872 P.2d 1051, 1053 (Utah Ct. App. 1994) (quotations and citations omitted)). Furthermore, a defendant's failure to marshal is fatal to consideration of his insufficiency claim. *State v. Farrow*, 919 P.2d 50, 53 n.1 (Utah App. 1996) (citing *Moore*, 802 P.2d at 739).

The defendant has all but ignored the marshaling requirement. Rather than comprehensively presenting all of the evidence introduced at trial supporting the verdict, he states in his brief that "there is absolutely no evidence to marshal" before summarily concluding that "the evidence is legally insufficient to sustain the [criminal trespass] charge." *See* Aplt. Brief at 10-11. Merely asserting that there is "no evidence" to support a conviction does not excuse an appellant from satisfying the marshaling requirement. The Utah Supreme Court has noted that:

> In some instances, as in this case, an appellant, in attempting to meet its marshaling burden, also might assert that the record does not contain any evidence in support of a particular finding of fact. Under such circumstances, the heavy burden of marshaling all of the evidence in support of the finding of fact does not shift to the appellee in order to refute the appellant's assertion of the absence of evidence. Rather, the appellee, when confronted with such a "no evidence" sufficiency challenge, need only point to a scintilla of credible evidence from the record that supports the finding of fact in order to overcome the appellant's "no evidence" assertion and to demonstrate that the appellant has failed to meet its marshaling burden.

Wilson Supply Inc. v. Fradan Mfg. Corp., 2002 UT 94 ¶21.

The defendant has not met this burden. Instead, he continues to reargue his version of the facts, which the jury has already rejected at trial. This is plainly insufficient to meet this Court's marshaling requirements. *See Scheel*, 823 P.2d at 473 (refusing to review a claim of insufficient evidence where defendant's brief merely reargued his case while ignoring much of the evidence supporting the verdict); *see also Wilson Supply*, Id at ¶22-23: ("An appellant fails to meet its marshaling burden if it merely restates or reviews the evidence that supports an alternate finding . . . a bald assertion, without more, does not mount a compelling challenge to the correctness of the trial court [.]" The defendant has failed to marshal the evidence, and the State has produced substantially more that the "scintilla of credible evidence" required to sustain the conviction under *Scheel* and *Wilson*. Therefore this Court should decline to consider defendant's sufficiency of the evidence claim.

b. Sufficiency of the Evidence

Notwithstanding the defendant's failure to marshal the evidence, the evidence supporting the jury verdict is substantial. The power of this Court to overturn a jury's verdict based on the insufficiency of the evidence is "quite limited." *Moore*, 802 P.2d at 738. An appellate court reviews the evidence and draws all reasonable inferences in the light most favorable to the jury's verdict, *State v. Brown*, 948 P.2d at 343, and a jury conviction will be reversed for insufficient evidence "only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." *Longshaw*, 961 P.2d 925, 928 (quotations omitted); *State v. Wright*, 893 P.2d 1113, 1117 (Utah App. 1995).

The defendant asserts that the evidence was insufficient to sustain the criminal trespass charge. In support of his theory, the defendant offers two arguments already rejected by the jury at trial; first he claims that he didn't know he was banned from the Liberty Center; and second, he claims he didn't know that his presence at the Liberty Center "would cause anyone to fear for their safety." *See* Aplt. Brief at 10-11.

The defendant initially claims that he didn't know he was trespassing on the date in question. He submits that he could not have been trespassing because Ms. Freeman didn't draft a letter formally documenting the reasons for his suspension until August 28, 2002. *See* Aplt. Brief at 11. This claim is not supported by the facts and the jury was justified in disregarding the defendant's theory. As noted above, Ms. Freeman testified that on June 27, 2002 she warned the defendant he would be banned from the Center if his abusive behavior continued. She further testified that the Liberty Center had received complaints that the defendant had been sleeping on the property after business hours. When the defendant violently confronted staff members on August 22, 2002 he was told in no uncertain terms that he was barred from the premises and that police would be called if he returned. Despite this warning, the defendant returned on August 26, 2002 and initiated a violent confrontation with the officers who arrived to investigate.

Contrary to the defendant's assertion, there was ample evidence to sustain the conviction and the jury properly rejected the defendant's claim that he "didn't know" he was trespassing when he returned to the Center on August 26, 2002. It should be also noted that while Ms. Freeman may have been confused about some of the dates in question, the ambiguity is of no consequence as the existence "of contradictory

evidence or conflicting inferences does not warrant disturbing the jury's verdict." *Longshaw*, 961 P.2d 925, 931 (quoting *State v. Howell*, 649 P.2d 91, at 97 (Utah 1982)). This is especially true here where the defendant chose not to rebut the State's witnesses by testifying himself. The only evidence supporting the defendant's claim that he didn't know he was trespassing is his own self-serving recitation of facts already rejected by the jury.

The defendant similarly urges this Court to reject the jury's conclusion that his actions caused others to fear for their safety and adopt the inference that he was doing noting more than lawfully "sitting peacefully" outside the Liberty Center on the day in question. *See* Aplt. Brief at 3, 10. This request is contrary to the requirement that this Court review the evidence and draw all reasonable inferences in the light most favorable to jury's verdict. *See Brown*, 948 P.2d at 343.

In the instant case, the jury found that the defendant was trespassing at the Liberty Center and inferred from the evidence that he was reckless as to whether his presence would cause other people to fear for their safety within the meaning of Utah Code Ann. 76-6-206. Certainly this was a reasonable inference given the testimony that the defendant became enraged and assaulted the officers who investigated the trespass.

It is the exclusive province of the jury to judge "both the credibility of witnesses and the weight to be given particular evidence." *Workman*, 852 P.2d 981, 984. It is only proper for a reviewing court to reweigh the evidence when there is a "physical impossibility of the evidence being true or when its falsity is apparent without any resort to inferences or deductions" *Workman*, 852 P.2d at 984 (citations omitted). In the

instant case, the jury heard the testimony and was best positioned to assess the credibility of the witnesses. After balancing the evidence, the jury rejected the inference that the defendant was lawfully on the premises on the date in question. This Court should not disturb the jury's findings or "substitute judgment on the credibility of the witnesses for that of the jury." *Wright*, 893 P.2d at 1117.

Finally, a defendant's claim that the evidence is insufficient to support the jury's verdict "necessarily fails when the defendant 'presumes that the jury was obligated to believe the evidence most favorable to the defendant[.]" *Longshaw*, 961 P.2d 925, 931 (quoting *Howell*, 649 P.2d 91, at 97). As noted above, the defendant did not testify and did not present any evidence at trial. He now urges this Court to reweigh the evidence in a light more sympathetic to himself and draw every inference in favor of acquittal. This is not the proper function of this Court. Absent an indication that the evidence supporting the verdict is sufficiently inconclusive or inherently improbable, this Court must defer to the jury. *Longshaw*, 961 P.2d at 932; *Brown*, 948 P.2d at 343; *Wright*, 893 P.2d at 1117. Because the evidence below conclusively establishes beyond a reasonable doubt that defendant was trespassing at the Liberty Center on the day in question, this Court must assume that the jury believed the evidence supporting the verdict and rejected the contrary evidence. *See Brown*, 948 P.2d at 343-44 (citing *Dunn*, 850 P.2d at 1213). Accordingly, the jury's verdict is not subject to reversal on appeal on the ground of insufficiency of the evidence.

CONCLUSION

The prosecutor's remarks during closing arguments were permissible in light of the evidence presented at trial and his summary of the evidence did not constitute prosecutorial misconduct. The defendant has failed to marshal the evidence and, at any rate, there was ample evidence to support the jury verdict convicting the defendant of criminal trespass. Therefore this Court should not disturb the jury verdict.

RESPECTFULLY SUBMITTED on 27 January 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on the _____ of January, 2006, I either mailed first-class postage prepaid or hand-delivered two copies of the foregoing Reply Brief to defendant's counsel of record, as follows:

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